

With the Emergence of Public Benefit Corporations, Directors of Traditional For-Profit Companies Should Tread Cautiously, but Welcome the Opportunity to Invest in Social Enterprise

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I. INTRODUCTION

With an increase in social entrepreneurship taking place over the past decade, state legislatures have felt a growing demand to adopt new corporate governance structures that align with the various objectives of U.S. companies. Social entrepreneurship, or social enterprise, has become the popular term used to describe business forms that aim to produce profits while also seeking to significantly advance one or more social or environmental goals.¹ Today, “[t]he idea of using business to create social and environmental value alongside profits has reached nearly every sector of the economy”² Social entrepreneurs can be found not only in progressive industries like organic farming and renewable energy, but also in more conservative industries such as insurance and banking.³ Leading proponents of this new business form have successfully lobbied state legislatures across the country to recognize the entrepreneurs’ desire for new corporate governance structures.⁴ Ben & Jerry’s, Patagonia, and Seventh Generation are just a few of the well-known companies that pushed their respective states to adopt what is being called “benefit corporation” legislation.⁵ Their efforts are particular ex-

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1. See Antony Page & Robert A. Katz, *Is Social Enterprise the New Corporate Social Responsibility?*, 34 SEATTLE U. L. REV. 1351, 1361–62 (2011).

2. John Tozzi, *America’s Most Promising Social Entrepreneurs*, BLOOMBERG BUSINESSWEEK (June 8, 2010), http://www.businessweek.com/smallbiz/running_small_business/archives/2010/06/americas_most_promising_social_entrepreneurs.html.

3. See *id.*

4. See Page & Katz, *supra* note 1, at 1361–62; *Legislation*, B LAB, <https://www.bcorporation.net/what-are-b-corps/legislation> (last visited Sept. 2, 2014) [hereinafter B LAB].

5. *Open Letter to Business Leaders*, B LAB (Aug. 1, 2013), <http://www.bcorporation.net/open-letter-to-business-leaders>.

amples from a movement that has resulted in nineteen states adopting some form of “benefit corporation”⁶ governance status within existing corporate codes.⁷

In the spring of 2010, Maryland and Vermont became the first states to enact benefit corporation legislation,⁸ with California, Hawaii, New Jersey, Virginia, and New York following suit in 2011.⁹ New legislation has allowed incorporating businesses to choose an off-the-shelf formation type that better aligns with the ideals of its own goals and embeds a social mission into its legal structure. It has also provided a path for existing incorporated businesses to amend their corporate charters to become benefit corporations.¹⁰

The bulk of the newly implemented statutory forms provide not only a new framework for social entrepreneurs to work within, but also an indication to socially conscious investors, consumers, and business partners that these businesses are obligated and dedicated to operating in a responsible and sustainable manner—in addition to their duty to generate shareholder profits. Public Benefit Corporations (PBCs) are generally formed in the same manner as traditional for-profit companies;¹¹ however, a PBC entity is usually required to identify in its certificate of incorporation a statement of purpose identifying one or more specific public benefits to be promoted by the corporation, and the entity must have a name that clearly identifies its status as a PBC.¹²

The compulsory notice requirement in a company’s certificate of incorporation announces to the world, and particularly to interested investors, that the PBC’s purpose may not align with the profit-driven business form shareholders have come to expect.¹³ As the number of

6. “Benefit corporation status represents a new legal structure whereby participating firms are legally obliged to consider social and environmental concerns on an equal footing to financial gains.” *Beyond Corporate Profits and Towards New Model Capitalism*, WORLD FIN. (Apr. 11, 2014), <http://www.worldfinance.com/strategy/beyond-corporate-profits-and-towards-new-model-capitalism> [hereinafter *Beyond Corporate Profits*].

7. B LAB, *supra* note 4.

8. Act of Apr. 13, 2010, 2010 Md. Laws 97 (codified at MD. CODE ANN., CORPS. & ASS’NS §§ 5–6C–01 to –07); Act of May 19, 2010, 2010 Vt. Acts & Resolves 228 (codified at VT. STAT. ANN. tit. 11A, §§ 21.01–21.14 (2010)).

9. See *State by State Legislative Status*, BENEFIT CORP. INFO. CENTER, <http://www.benefitcorp.net/state-by-state-legislative-status> (last visited Aug. 31, 2014).

10. See DEL. CODE ANN. tit. 8, § 363(a) (2013). In Delaware, an existing corporation that is not a public benefit corporation may—with approval of 90% of the outstanding shares of each class of the corporation’s stock—amend its certificate of incorporation to include a provision identifying within its statement of business or purpose one or more specific public benefits to be promoted by the corporation. *Id.*

11. DEL. CODE ANN. tit. 8, § 361 (2013).

12. See DEL. CODE ANN. tit. 8, § 362 (2013).

13. D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 277–78 (1998).

PBCs continues to increase across the country¹⁴—indicating that this form is gaining traction and becoming somewhat popular among new business founders and even consumers—many unknowns exist regarding how individual and institutional investors will respond.¹⁵ In traditional for-profit corporate governance structures, directors arguably have a general duty to maximize shareholder value, and, at a minimum, have a duty to advance the long-term interest of stockholders.¹⁶ In drafting PBC statutes, advocates of social enterprise and supportive legislators intended to avoid the presupposed mandate for corporations to solely maximize shareholder wealth as a matter of corporate purpose.¹⁷ PBCs are supposed to operate not just for the benefit of the shareholders, but directors of these entities must aim to make decisions that are in the best interest of society as a whole, as well as the bottom line.¹⁸

Currently, hundreds of private companies throughout the United States have formed or converted into PBCs, but no publicly traded company has embraced the PBC form.¹⁹ With Delaware enacting new legislation enabling the formation of PBCs in August 2013,²⁰ Campbell Soup Company (Campbell) became the only publicly traded corporation in the United States with a wholly owned subsidiary that is a PBC.²¹ Plum Organics, PBC (Plum Organics) was acquired by Campbell in May 2013, and while Campbell has stated that it embraces Plum Organics' mission and efforts under the PBC form, questions remain about how Campbell

14. In 2008, there were 125 Certified B Corporations; as of today, there are over 950. *Beyond Corporate Profits*, *supra* note 6. "Certified B Corporation is a certification conferred by the non-profit B Lab. . . . Benefit corporations do NOT need to be certified." B LAB, *supra* note 4.

15. It is generally unknown how PBCs will attract investors and whether any will ever "go public" and attract individual and institutional investors. See Alicia Plerhoples, *Delaware Public Benefit Corporations 90 Days Out: Who's Opting In?*, 14 U.C. DAVIS BUS. L.J. 247 (2014).

16. *Katz v. Oak Indus., Inc.*, 508 A.2d 873, 879 (Del. Ch. 2010). "As it has long done, Delaware law still requires directors to put shareholder interests ahead of those of nonshareholders. At least in Delaware, the shareholder wealth maximization norm thus remains a more accurate description of the state of the law than any of its competitors." Alicia E. Plerhoples, *Can an Old Dog Learn New Tricks? Applying Traditional Corporate Law Principles to New Social Enterprise Legislation*, 13 TRANSACTIONS: TENN. J. BUS. L. 221, 242 (2012).

17. William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 825 (2012).

18. B LAB, *supra* note 4.

19. Ariel Schwartz, *Inside Plum Organics, the First Benefit Corporation Owned by a Public Company*, CO.EXIST (Jan. 22, 2014, 8:08 AM), <http://www.fastcoexist.com/3024991/world-changing-ideas/inside-plum-organics-the-first-benefit-corporation-owned-by-a-public-co>.

20. *Delaware Unveils Public Benefit Corporation Legislation*, DELAWARE.GOV (Apr. 18, 2013), <http://news.delaware.gov/2013/04/18/delaware-unveils-public-benefit-corporation-legislation>.

21. Aman Singh, *Campbell Becomes America's First Public Company to Acquire a Public Benefit Corporation: In Conversation with Plum Organics' Cofounder*, CSRWIRE (Sept. 17, 2013, 8:41 AM), <http://www.csrwire.com/blog/posts/1005-campbell-becomes-america-s-first-public-company-to-acquire-a-public-benefit-corporation-in-conversation-with-plum-organics-cofounder>.

will be able to align the PBC principles of the subsidiary while responding to its own shareholders' concerns regarding the pressures of quarterly and annual balance sheets.²²

This Note addresses the prospective risk that traditional shareholder expectations could dissuade directors of publicly traded for-profit companies from investing in and acquiring PBCs as wholly owned subsidiaries; specifically, because inconsistent corporate purposes between a parent company and its subsidiary could result in an unprecedented new type of director liability. Part II of this Note begins by presenting background information on the Delaware PBC statute. It also provides a brief overview of the differing duties between directors of traditional for-profit corporations and those of PBCs in fulfilling corporate purposes. Part III analyzes the potential for shareholders of a parent company to enjoin directors from investing in or acquiring a PBC as a wholly owned subsidiary. Part IV explores the ability of shareholders to select investments in a publicly traded parent company for the sole purpose of bringing a double derivative lawsuit on behalf of the parent company to enforce certain social expectations on behalf of a PBC subsidiary. Part V acknowledges several steps that directors of publicly traded companies should consider before approving plans to embrace a PBC entity within its web of subsidiary businesses. Finally, Part VI provides a brief conclusion.

II. DELAWARE AND ITS PBC LAW

Part II discusses how Delaware introduced and adopted PBC legislation, and notes the impact that Delaware's leadership in corporate law may have on future issues related to PBCs. Additionally, it discusses facial differences in Delaware's new PBC law that are of importance when discussing corporate purpose and the governing duties of directors.

A. Delaware's Adoption of PBC Law

PBC legislation was introduced under Senate Bill 47 on April 18, 2013, in the 147th Delaware General Assembly.²³ Senate Bill 47, entitled *An Act to Amend Title 8 of the Delaware Code Relating to the General Corporation Law*, would enable the formation of PBCs in Delaware.²⁴ The Bill was lauded by Senator David Sokola, who stated that he was proud to sponsor legislation that gave "corporations a way to rebuild public trust in business by ensuring that the benefits of their work ex-

22. *Id.*

23. S.B. 47, 147th Gen. Assemb., Reg. Sess. (Del. 2013), available at <http://www.legis.delaware.gov/LIS/LIS147.NSF/vwLegislation/SB+47?Opendocument>.

24. *Id.*

tend[ed] beyond their stockholders and managers.”²⁵ The bill received bipartisan support upon its introduction, and unanimous approval in both the State House and Senate followed.²⁶ Upon signing the bill, Delaware’s Governor also issued the following statement of support: “With the addition of Public Benefit Corporations, Delaware will continue to be a leader and support a new movement of social entrepreneurs and investors who are stepping forward to meet high standards of corporate purpose, accountability and transparency.”²⁷

On August 1, 2013, Delaware’s PBC legislation went into effect, and businesses began to file the necessary paperwork to form PBCs in accordance with the new law.²⁸ In total, seventeen businesses filed to incorporate as PBCs on the first day of enactment.²⁹ More than 110 businesses incorporated as PBCs in the State of Delaware between August 1, 2013 and December 31, 2013.³⁰

B. Delaware’s Leadership in Corporate Law

Delaware is the home of more than one million legal entities and many of the nation’s largest businesses.³¹ And because Delaware is also home “to most venture-backed businesses, 50% of all publicly-traded companies, and 64% of the Fortune 500, it is the most important state for businesses that seek access to venture capital, private equity, and public capital markets.”³²

But beyond the numbers, Delaware’s leadership in corporate law derives from its “well-established body of precedent, its highly regarded judiciary, . . . its supposed tilt (or lack thereof, depending on one’s viewpoint) toward management or investors. Delaware’s bench also has the advantage of having so many opportunities to address critical corporate law issues.”³³ Accordingly, Delaware has arguably the most developed body of corporate common law jurisprudence dictating the appropriate

25. *Delaware Unveils Public Benefit Corporation Legislation*, *supra* note 20.

26. See S.B. 47, 147th Gen. Assemb., Reg. Sess. (Del. 2013), available at <http://www.legis.delaware.gov/LIS/LIS147.NSF/vwLegislation/SB+47?Opendocument>.

27. *Delaware Unveils Public Benefit Corporation Legislation*, *supra* note 20.

28. *Governor Markell Registers Delaware’s First Public Benefit Corporations*, DELAWARE.GOV (Aug. 1, 2013), <http://news.delaware.gov/2013/08/01/governor-markell-registers-delawares-first-public-benefit-corporations/>.

29. *Id.*

30. JEFFERY W. BULLOCK, DELAWARE DIVISION OF CORPORATIONS 2013 ANNUAL REPORT 1 (2014), available at http://corp.delaware.gov/Corporations_2013%20Annual%20Report.pdf.

31. *Delaware Unveils Public Benefit Corporation Legislation*, *supra* note 20.

32. B LAB, *supra* note 4.

33. Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405, 408 (2013).

application of fiduciary principles.³⁴ Furthermore, recent rulings from Delaware's Court of Chancery regarding the matter of corporate purpose will likely influence how shareholders today view their position within the concept of the firm.³⁵

As a result of Delaware's dominance over these matters, it is natural for business lawyers, scholars, and the rest of the country to look to its courts for guidance in the application of new benefit corporation laws when novel and unusual conflicts and questions arise regarding the management and operation of PBCs.

C. Changes in the New Law

Delaware's new PBC law departs from the general corporate code controlling for-profit companies in two principal ways: it transforms both the standard corporate purpose and the duties of corporate directors.³⁶

1. Corporate Purpose

Under Delaware's general corporation law, the statute governing corporate purpose broadly states that a corporation may be incorporated or organized "to conduct or promote any lawful business or purposes."³⁷ However, Delaware's new PBC statute requires that electing corporations, in pursuing any lawful business, trade, or activity, promote a *specific* public benefit or public benefits and operate in a responsible and sustainable manner.³⁸ "Public benefits for which corporations may be formed include, but are not limited to, those of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technical nature."³⁹

2. Director's Duties

Delaware's general corporation law imposes two basic fiduciary duties on directors, that of loyalty and that of care.⁴⁰ Corporate directors owe these duties both to the corporation itself and to its shareholders.⁴¹

34. See David B. Feirstein, Note, *Parents and Subsidiaries in Delaware: A Dysfunctional Standard*, 2 N.Y.U. J.L. & BUS. 479 (2006).

35. Johnson, *supra* note 33, at 442–44.

36. DEL. CODE ANN. tit. 8, § 362(a) (2013); DEL. CODE ANN. tit. 8, § 365 (2013).

37. DEL. CODE ANN. tit. 8, § 101(b) (2011).

38. DEL. CODE ANN. tit. 8, § 362(a) (2013).

39. *Governor Markell Registers Delaware's First Public Benefit Corporations*, *supra* note 28.

40. *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. Ch. 1939).

41. *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984). Great deference is given to directors of for-profit companies in fulfilling these duties because the business judgment rule creates a presumption at the judicial level that directors have "acted on an informed basis, in good faith, and in the

One of the most significant developments that emerged from the implementation of Delaware's new PBC law is the statutory duty PBC directors owe to additional stakeholders.⁴² Delaware's PBC law outlines three primary duties that directors of a PBC are expected to balance in their managerial and administrative roles:

The board of directors shall manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation.⁴³

For companies electing to become PBCs, the recent developments in Delaware's corporate code dramatically alter how fiduciary principles will be applied to those directors attempting to satisfy a PBC's corporate purpose. In light of the changes stemming from Delaware's new PBC law, the next two Parts focus specifically on the new paradigm of publicly traded corporations acquiring or forming wholly owned PBC subsidiaries.

III. INVESTING IN OR ACQUIRING A PBC AND THE POTENTIAL FOR DIRECTOR LIABILITY

The history of corporate law, while not completely clear-cut, has generally reiterated that directors, in fulfilling their corporate duties, "are to maximize shareholders profits, 'subject to the constraint that the corporation must meet all its legal obligations to others.'"⁴⁴ This traditional position is most notably emphasized in *Dodge v. Ford Motor Co.*, where the court stated:

[A] business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself⁴⁵

honest belief that their actions are in the best interest of the company." Johnson, *supra* note 33, at 411 (citing *Aronson*, 473 A.2d at 812); *see also* *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360–61 (Del. 1994).

42. DEL. CODE ANN. tit. 8, § 365 (2013) (amended 2014).

43. *Id.* § 365(a).

44. Mark E. Van Der Weide, *Against Fiduciary Duties to Corporate Stakeholders*, 21 DEL. J. CORP. L. 27, 29 (1996); *accord* *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919).

45. *Dodge*, 170 N.W. at 684.

Although this traditional viewpoint⁴⁶ often appears from business convention to be the only acceptable corporate purpose of, and the ultimate constraint on, director decisionmaking, the Delaware Supreme Court has mandated little, if any, action forcing corporate directors to maximize profits or shareholder wealth.⁴⁷ Delaware courts have noted that corporations should advance the long-term interests of stockholders, and a director's duty to maximize share prices in the short term arises only in one narrow setting: "a corporation's 'end-stage,' i.e., in a corporate break-up, when they initiate an active bidding process, or when they enter into a transaction that shifts a dispersed shareholding base into a controller's hands, essentially a privatization."⁴⁸

Delaware courts use the business judgment rule to protect director decisionmaking, so long as decisions made remain aligned with Delaware's traditional law for corporate purpose—"to conduct or promote any lawful business or purposes."⁴⁹ The business judgment rule establishes the presumption "that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the company."⁵⁰ The Delaware courts are not in the practice of second-guessing business decisions made by corporate directors;⁵¹ the Delaware courts recognize that directors, not judges, are the ones elected by a corporation's stockholders to run and manage the affairs of each unique company.⁵² Thus, absent a showing that corporate directors (1) failed to "use that amount of care which ordinarily careful and prudent men would use in a similar circumstances"⁵³—breaching the duty of care—or (2) wrongly engaged in self-dealing or appropriating corporate opportunities—breaching the duty of loyalty⁵⁴—Delaware courts will not regulate or control directors' decisionmaking processes.

46. Also referred to as the "shareholder primacy model." Johnson, *supra* note 33, at 435.

47. *See id.* at 446–47.

48. Johnson, *supra* note 33, at 433; *accord* *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 48–49 (Del. 1994); *see also* *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986).

49. DEL. CODE ANN. tit. 8, § 101(b) (2011).

50. *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984) (citing *Kaplan v. Centex Corp.*, 284 A.2d 119, 124 (Del. Ch. 1971)).

51. *See Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1994).

52. *See* Lyman Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. L. 439, 456–57 (2005).

53. *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 749 (Del. Ch. 2005).

54. *See, e.g., Telxon Corp. v. Meyerson*, 802 A.2d 257, 263 (Del. 2002) (example of directors usurping a corporate opportunity); *Guth v. Loft*, 5 A.2d 503, 510 (Del. Ch. 1939) (example of self-dealing by corporate directors).

If the presumption remains under the business judgment rule that directors are behaving carefully and loyally in discharging their duties, and traditional for-profit corporations do not require the advancement of a particular corporate purpose, is a multistakeholder statute like the one allowing for the formation of PBCs necessary? And does it now change shareholder expectations of those investing in traditional for-profit corporations? On the surface, the need for a PBC form may seem unnecessary or superfluous with so many director decisionmaking protections already in place. Yet, Delaware legislators felt that the adoption of this new business form necessitated missions and goals that went “beyond the historical board–stockholder relationship,”⁵⁵ ensuring further protection for businesses and their management.

Now that the PBC form exists under Delaware law, a strong argument could be made for the shareholder primacy model to become an increasingly standardized expectation of investors in traditional for-profit companies. These shareholders may come to believe that businesses that choose to divert from the norm of shareholder wealth-maximization will and should simply incorporate as, or convert to, a PBC instead of trying to operate under the same traditional governance structure. This perspective could grow and emerge over time as PBCs become increasingly more common or popular and investors become more educated about the differences between the two business types. The often shifting expectations and debates about the proper goals of corporate activity may finally come to rest; two different models provide for a separation between corporations solely driven by profits and those taking a more holistic and social approach to business.⁵⁶

Because shareholder interests and expectations should have an impact on the operation of today’s modern corporations, an attempt to understand the differences between the purpose of traditional for-profit corporations and PBCs must be considered carefully by directors and managers who plan to dip into both pots. Shareholder interests are not homogenous in today’s informed investing world. Shareholder interests “diverge in several ways[:]. . . . long-term versus short-term; diversified versus non-diversified; individual versus institutional; common versus preferred; stripped versus unstripped; dividend-income preferring versus capital-appreciation preferring.”⁵⁷ In response to these realities, directors of for-profit companies ought to be prepared to adhere strictly to a tradi-

55. *Delaware Unveils Public Benefit Corporation Legislation*, *supra* note 20 (quoting Del. Rep. Bryon Short).

56. See Johnson, *supra* note 33, at 435.

57. Van Der Weide, *supra* note 44, at 37.

tional shareholder primacy model or consider actively lobbying majority shareholders to vote and approve an amendment to the corporation's charter to become a PBC.

As outlined above, the purpose-splitting under the new law provides entrepreneurs and company founders, for the first time, with an alternative to solely profit-seeking ventures.⁵⁸ The PBC form allows directors the freedom to make decisions in light of established social missions and not just out of a strict allegiance to the company's shareholders.⁵⁹ A dichotomy between the levels of director duties arises, however, when a for-profit company, like Campbell, acquires a PBC, like Plum Organics, as a wholly owned subsidiary. As a long-standing and conventionally formed for-profit corporation, Campbell remains restricted by the traditional corporate purpose principles outlined under Delaware General Corporation Law section 101, and as such, its directors should endeavor to operate primarily for the long-term benefit of its shareholders.⁶⁰ However, in acquiring Plum Organics, Campbell has actively chosen to invest in a social enterprise that may yield lower returns and dividends for the company, which ultimately impacts the bottom line and affects earnings all the way up the food chain to its own shareholders.

The potentially adverse financial impact on Campbell's shareholders could theoretically result in a class action or derivative suit challenging the acquisition of Plum Organics simply because it is a PBC. While a resulting class action or derivative suit against the company seems remote and unlikely, recent decisions issued by the Delaware courts should at least be considered before large for-profit companies follow in Campbell's footsteps and begin on a social enterprise investing spree.⁶¹ In 2010, the Delaware Court of Chancery, outside the so-called *Revlon-land* setting,⁶² articulated the *eBay* opinion, stating that a for-profit corpora-

58. See Governor Markell Registers Delaware's First Public Benefit Corporations, *supra* note 28.

59. See DEL. CODE ANN. tit. 8, § 365 (2014).

60. See *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.2d 1, 33 (Del. Ch. 2010).

61. See, e.g., *id.*

62. The term *Revlon-land* refers to the point at which the *Revlon* doctrine applies: Under current Delaware law, if a business combination is deemed to constitute a "sale of the company" or a "sale of control" it is governed by the *Revlon* doctrine. That doctrine makes two important changes. First, the board's fiduciary duties are no longer focused on the long-term well-being of the corporation . . . [but on the] interests of the stockholders in achieving a transaction that will maximize the immediate value of their shares. . . . Second, if the board's performance of these "Revlon duties" is challenged, the court will not defer to the board's business judgment even, though the board's independence, disinterestedness, and diligence would have earned such deference under the business judgment rule.

tion could not advance any corporate purpose it wished and that a corporate policy is improper if it does not seek to maximize economic value for stockholders.⁶³ The facts of the case involved an investment in Craigslist, whose corporate sales policy and strategy was to operate as a community service, refusing to sell advertising space on its website.⁶⁴ Craigslist's business model was deemed to be at odds with the rights and priorities of its shareholders, particularly minority shareholder eBay.⁶⁵ Chancellor Chandler noted that it was not for Craigslist's directors to decide what purpose a corporation they founded and controlled should advance.⁶⁶ He further stated that directors could not simply choose to reject or ignore their statutory obligations and that the "Inc." at the end of a Delaware corporation's name means the corporation's board is precluded from advancing policies that "admittedly seek[] *not* to maximize the economic value of a for-profit Delaware corporation"⁶⁷ This reaffirmation of the shareholder primacy model raises concerns for corporate boards that wish to donate to charitable causes⁶⁸ and invest in social enterprise as part of broad operational policies.

While the shareholder primacy model's dominance may concern companies seeking to expand the scope of their investments, shareholders may have little reason to worry when considering the long-term value of such investments. For example, when Campbell acquired Plum Organics in 2013, it paid a purchase price of \$249 million.⁶⁹ For a growing global food company like Campbell with annual sales of more than \$8 billion,⁷⁰ this drop in the bucket likely went unnoticed by most of Campbell's shareholders. Plum Organics, even as a PBC, is also a great marketing investment for Campbell with its booming growth—135% from 2012 to 2013.⁷¹ Further, because Plum Organics' socially-conscious purpose may draw in new customers to the family of Campbell-brand prod-

Clark W. Furlow, *Reflections on the Revlon Doctrine*, 11 U. PA. J. BUS. L. 519, 520–521 (2009) (citing *Paramount Commc'ns, Inc. v. QVC Network Inc.*, 637 A.2d 34, 36 (Del. 1994); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986)).

63. *eBay*, 16 A.2d at 34.

64. *Id.* at 33.

65. *Id.* at 34.

66. *Id.*

67. *Id.* (emphasis in original). "At the theory level, the opinion strongly manifests Berle's 'trust' conception of the director–stockholder relationship" Johnson, *supra* note 33, at 444.

68. "The test of whether a corporation may make a charitable gift is its reasonableness." *Sullivan v. Hammer*, 1990 Del. Ch. Lexis 119, at *18–19 (Del. Ch. Aug. 7, 1990) (Hartnett III, V.C.) (citing *Theodora Holding Corp. v. Henderson*, 257 A.2d 398, 405 (Del. Ch. 1969)).

69. Campbell Soup Co., Annual Report (Form 10-K), at 13 (July 28, 2013).

70. *About Us*, CAMPBELL SOUP CO., <http://www.campbellsoupcompany.com/about-campbell> (last visited Aug. 31, 2014).

71. Singh, *supra* note 21.

ucts, the acquisition is arguably a low-risk transaction for Campbell. Overall, the acquisition of Plum Organics aligned with Campbell's business philosophies without much voiced concern from either company; both parties seem content, and disgruntled shareholders have not publicly admonished Campbell for its decision.⁷² Even the cofounder and president of Plum Organics, Neil Grimmer, seemed unconcerned about any potential conflicts arising out of the transaction: "We have a mission centric core: nutrition and solving hunger with our benefit corporation status[,] our secret sauce[,] and innovation driving the entire process. Campbell has a dual mandate: strengthen the core Campbell business while driving new consumers and innovation. It's a perfect marriage."⁷³

Although Campbell and Plum Organics' utopian outcome seemingly diminishes the appearance of any risk for directors investing in social enterprises, when diverging interests strike at the bottom line of a parent corporation's share value, stockholders are sure to notice and take action. The point at which shareholders will have a valid claim against directors who actively divert funds to PBC subsidiaries as investments, while expecting little to no return for the parent company, is unknown.

The bold moves that Campbell has taken in its social aspirations provide an exemplary model of goodwill; in 2013, Campbell reported charitable giving at \$52.6 million—\$44 million of which was food or in-kind donations.⁷⁴ Campbell chose, in part, to acquire Plum Organics because of Plum Organics' social mission to help eradicate childhood hunger, which aligned with Campbell's own Corporate Social Responsibility (CSR) program.⁷⁵ Campbell's vice-president, Dave Stangis, even stated that the two corporate teams "are connecting on joint priorities" to build on a "collective impact."⁷⁶ All of these decisions and steps are commendable from a social mission perspective, but will profit-driven shareholders see this conduct in the same light and from the same viewpoint

72. See *Campbell Completes Acquisition of Plum Organics*, CAMPBELL SOUP CO. (June 13, 2013), <http://investor.campbellsoupcompany.com/phoenix.zhtml?c=88650&p=irol-newsArticle&ID=1829771&highlight=>.

73. Aman Singh, *Campbell Becomes America's First Public Company to Acquire a Public Benefit Corporation: In Conversation with Plum Organics' Cofounder*, CSRWIRE (Sept. 9, 2013, 8:41 AM), <http://www.csrwire.com/blog/posts/1005-campbell-becomes-america-s-first-public-company-to-acquire-a-public-benefit-corporation-in-conversation-with-plum-organics-cofounder>.

74. *Campbell's 2014 Corporate Social Responsibility Social Scorecard*, CAMPBELL SOUP CO. CSR, <http://www.campbellcsr.com/Performance/Social.html> (last visited Oct. 17, 2014) [hereinafter *Campbell 2014 CSR Scorecard*]. Compare Campbell's \$52.6 million in giving to \$20 million, the median total amount given in 2013 by 240 companies, including 60 of the largest 100 companies in the Fortune 500. CECP, *GIVING IN NUMBERS: 2013 EDITION 4* (2013), available at http://cecp.co/pdfs/giving_in_numbers/GIN2013_Web_Final.pdf.

75. Singh, *supra* note 21.

76. *Id.*

as the decisionmaking directors? They may not—and they may even be hostile to the idea—if from the outset the shareholders' singular goal was to invest in a profit-driven company. A later realization that a shareholder's investment in a publicly traded, for-profit company includes ties to a PBC subsidiary could result in shareholders seeking retributive action.

With a publicly traded company like Campbell, the liquidity of the market allows shareholders to speak with their pocketbooks and subsequently sell their shares in response to such an acquisition.⁷⁷ But in the future, shareholders could potentially take a step further and act as they did in *eBay* and attempt to get the courts to enjoin the directors from even approving such an acquisition from the beginning.

This potential issue is rather unsettling for Campbell and any parent company looking to invest in or acquire a PBC. The precise reach of the shareholder primacy model, in relation to the presumed business judgment protection for directors, is untested in this particular circumstance. Whether strict corporate purposes should be mandated in order to clearly separate the convergence of these two entity models is a matter that only the Delaware courts will be able to answer.

IV. POTENTIAL FOR DOUBLE DERIVATIVE SUITS

“[I]n a parent and wholly-owned subsidiary context, the directors of the subsidiary are obligated only to manage the affairs of the subsidiary in the best interest of the parent and its shareholders.”⁷⁸ This outlined expectation from a Delaware Supreme Court opinion seems to indicate a fairly clear guideline for directors of wholly owned subsidiaries: act in the best interest of the parent.⁷⁹ But a traditional, single-purpose path cannot reasonably be undertaken by directors of a PBC subsidiary who are obligated by law to consider various stakeholders, not just one.⁸⁰ In the decisionmaking process, these directors must balance their duties carefully, while also being cognizably aware of any potential for a double derivative suit.

A double derivative suit is an action brought by the shareholder, or shareholders, of the parent corporation to redress a wrong at the subsidiary level and enforce a cause of action belonging to the wholly owned subsidiary.⁸¹ Shareholders of a parent company possess the unique stand-

77. See Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407, 413–14 (2006).

78. *Anadarko Petroleum Corp. v. Panhandle E. Corp.*, 545 A.2d 1171, 1174 (Del. 1988).

79. See *id.*

80. *Id.*

81. BYRON F. EGAN, FIDUCIARY DUTIES OF DIRECTORS AND OFFICERS IN M&A TRANSACTIONS 62 (2012), available at <http://images.jw.com/com/publications/1729.pdf>.

ing to bring double derivative suits on behalf of a company's wholly owned subsidiary.⁸² Typically, only the parent corporation, acting through its board of directors, is empowered to enforce these claims, but in particular cases,⁸³ shareholders of the parent may possess such a right.⁸⁴ Fundamentally, this power means that the shareholders of a traditional for-profit company could maintain an action on behalf of a wholly owned PBC subsidiary where all other factors necessary to maintain a conventional derivative suit are present.

Under Delaware's PBC law, "Stockholders of a public benefit corporation . . . may maintain a derivative lawsuit to enforce the requirements set forth" for directors.⁸⁵ Specifically, the law states:

The board of directors shall manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation.⁸⁶

Where the directors of a parent company could validly bring a derivative lawsuit against the directors of a wholly owned PBC subsidiary for failing to properly balance the three duties required by the PBC statute, the law also arguably creates a right for shareholders of the parent company to bring the same lawsuit when and if the parent company directors fail to do so.⁸⁷

The magnitude of this latent outcome can be realized under two specific situations: (1) where the PBC subsidiary fails to provide for its specified social purpose and is instead kicking all or most of its profit up to the parent company; or the inverse, (2) where the PBC subsidiary, in prioritizing its social mission, fails to yield any real profit to the investing parent company. Both of these outcomes would result in severe fi-

82. See David W. Locascio, *The Dilemma of the Double-Derivative Suit*, 83 NW. U. L. REV. 729, 730 (1989).

83. "[W]here the parent corporation's board is shown to be incapable of making an impartial business judgment regarding whether to assert the subsidiary's claim." EGAN, *supra* note 81, at 62–63.

84. *Id.*; see also *In re Bear Stearns Co., Inc.*, 763 F. Supp. 2d 423 (S.D.N.Y. 2011). For a shareholder to have standing to maintain a derivative action, the plaintiff "must not only be a stockholder at the time of the alleged wrong and at the time of commencement of suit but . . . must also maintain shareholder status throughout the litigation." *Lewis v. Anderson*, 477 A.2d 1040, 1046 (Del. 1984).

85. DEL. CODE ANN. tit. 8, § 367 (2013).

86. DEL. CODE ANN. tit. 8, § 365(a) (2013).

87. Locascio, *supra* note 82, at 743–44 (discussing how courts have justified derivative suits by treating the parent and subsidiary corporations as one entity); see, e.g., *Martin v. D. B. Martin Co.*, 88 A. 612, 613–14 (Del. Ch. 1913).

nancial imbalances unlikely to go ignored by a parent company's stockholders.

While the first outcome may appear ideal to an investor trying to make a quick buck, socially conscious investors may begin to seek out publicly traded companies with wholly owned PBC subsidiaries as a means to indirectly invest in PBCs prior to the establishment of a publicly traded PBC. These individuals may become activist investors that demand and pressure the directors of the parent company to reject certain policies or guidelines as a means to hold the PBC subsidiary accountable to its stated public benefit.

In contrast, in the latter situation, a money-hungry investor may make an opposing argument: the PBC subsidiary, in redirecting profit to its stated public benefit, is neglecting to return an adequate dividend to the parent company, thus diminishing overall returns to all stockholders at the top of the food chain. While both situations demonstrate extreme depictions on either side of the spectrum, these circumstances could come to fruition in some form.⁸⁸ An ensuing double derivative suit would be the expected proceeding to effectuate a forcible change at the subsidiary level by stockholders of the parent company.⁸⁹

V. BEST PRACTICES AND RECOMMENDATIONS

Uncharted and untested territory in corporate law can be an unpleasant reality for any business, especially when a company's board of directors tries to make strategic business decisions in light of new and developing law. Looking ahead, directors and executives should be able to continue under the presumption of the business judgment rule when making investment decisions they believe add shareholder value while also contributing to a social good. Part V is meant to offer best practice recommendations for a traditional for-profit company considering making a social enterprise investment and possibly acquiring a PBC as a subsidiary. Suggestions are made in an attempt to help maximize the effectiveness of these investments while minimizing potentially opportunistic or wasteful behavior—or the appearance of opportunistic or wasteful behavior—by directors.

A. Align Investment with Current Business Activities

When viewing a corporation's entire portfolio of businesses, subsidiaries, and brands, the board of directors should ensure that all of its

88. See *supra* Part II.C.

89. See generally Locascio, *supra* note 82.

decisions contribute to the financial growth of the company. As repeatedly shown,⁹⁰ a for-profit company's purpose is derived from the requirement that directors make decisions for the long-term benefit of the corporation's stockholders. Therefore, in order to fulfill this requirement when investing in PBCs, directors of for-profit companies should carefully consider how to align these investments with current business activities.

Campbell is an important first example for businesses to follow. As a large conglomerate, Campbell looked at what areas of the grocery food market were growing; it targeted baby food—specifically, organic baby food—and acquired a business that would expose its already established brand to a multitude of new consumers.⁹¹ Campbell's acquisition of Plum Organics was anything but random or hasty; it was deliberate and well planned.⁹² Additionally, Campbell has maintained Plum Organics as a standalone business,⁹³ furthering plans for the businesses to synergize only some of their distinct operational and sustainability resources where it would better improve the profitability of *both* companies.⁹⁴ This example of cooperation between Campbell and Plum Organics presents a compelling justification for stockholders, who have likely studied this strategic acquisition when they consider whether they want to remain invested in Campbell or cash out and sell their shares.

Following Campbell's example, company directors must assure their stockholders that the acquisition of a particular PBC is not simply a marketing ploy or a nonstrategic philanthropic decision, but that real returns from the acquisition will manifest for the parent company and the stockholders as a whole. Most importantly, a board should only approve an acquisition of a PBC subsidiary when it truly believes that there will be significant benefits gained as a result of the deal, and that those benefits will be consistent with the business strategy that the directors have undertaken and presented to their stockholders.

90. *See supra* Part III.

91. Monica Watrous, *Baby Food, Baby Carrots Shake up Campbell's Portfolio*, FOOD BUS. NEWS (Aug. 30, 2013), http://www.foodbusinessnews.net/articles/news_home/Business_News/2013/08/Baby_food_baby_carrots_shake_u.aspx?ID={6374FE7D-22FC-4410-9174-34CFD6730FAE}.

92. *See id.*

93. Singh, *supra* note 21.

94. "We have already begun working with Neil [Grimmer, founder of Plum Organics] and the Plum team. We are connecting on joint priorities and sharing Campbell's CSR and sustainability resources." *Id.* (quoting Campbell's Vice President—Public Affairs and Corporate Responsibility, Dave Stangis).

B. Align Investment with Current Corporate Social Responsibility Plans

Aligning the interests of potential investments with current business activities is a smart first step, but aligning an investment in a PBC with a company's existing charitable goals may also help to mitigate potential liability risks. Many large businesses already have corporate social responsibility (CSR) platforms that donate millions of dollars to foundations and charity groups every year.⁹⁵ Many of these programs and initiatives are established to utilize a business's unique resources and leverage its position to make a greater and higher-yielding impact for a social good.⁹⁶ If companies investing in PBCs utilize an approach similar to that outlined in their CSR initiatives, their efforts may not be viewed as disruptive or financially harmful. Aligning current social goals with a material investment is a strategic move that could appeal to current customers and employees, eventually increasing the corporation's market base and value.

Utilizing a transparent approach that informs stockholders of the similarly aligned motives and goals between both the parent company and the PBC subsidiary will help reduce skepticism about the company's motivation in acquiring a PBC and ensure that stockholders understand a board's reasoning and purpose for making this particular business decision.

When Campbell issued a press release regarding the acquisition of Plum Organics, it took these important steps to demonstrate and celebrate how the two companies shared aligned pursuits and similarities.⁹⁷ For Campbell, this included highlighting its past campaigns to help target and eradicate hunger and provide resources to New Jersey-based food programs and food banks.⁹⁸ Campbell can easily argue that bringing in a PBC subsidiary like Plum Organics furthers its social mission, which is familiar and well-known to Campbell's stockholders—it does not displace current expectations.

95. See Matteo Tonello, *Making the Business Case for Corporate Philanthropy*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REFORM (Aug. 20, 2011), <https://blogs.law.harvard.edu/corpgov/2011/08/20/making-the-business-case-for-corporate-philanthropy/#28b>.

96. See *id.*

97. Singh, *supra* note 21.

98. In 2012, Campbell's campaign, "Just Peachy" salsa, produced over 40,000 jars of salsa to provide to the South Jersey Food Bank for resale. The contribution raised \$100,000 for the South Jersey Food Bank through retail sales. Singh, *supra* note 21. As stated in Part III, *supra*, charitable contributions for Campbell in 2013 were upwards of \$50 million. *Campbell 2014 CSR Scorecard*, *supra* note 74.

C. Establish Standards of Independence for Directors

When a corporation's board is seeking to acquire a PBC as a wholly owned subsidiary, as with all acquisitions, it should ensure that its directors avoid self-dealing or lauding self-interested transactions. Delaware jurisprudence demands that "the best interests of the corporation and its stockholders take precedence over any personal interest or bias of a director that is not shared by stockholders."⁹⁹ A potential conflict arises most notably when a company proposes to acquire a subsidiary that is in some way affiliated with one of the company's directors or officers.¹⁰⁰

Corporate directors should neither appear on both sides of a transaction nor expect to derive any personal financial benefit from a transaction.¹⁰¹ Thus, it is prudent for directors to bear in mind that courts can and will set aside deals that do not follow a fair procedure or result in a fair value for stockholders.¹⁰² To avoid the appearance of a conflict of interest, companies should adopt strict rules or standards¹⁰³ that disqualify any director who may be an investor in, or play some instrumental role (i.e., officer or director) in, the potential target business from overseeing the acquisition process or voting on the proposed deal. Simply put, internal controls must prevent directors and executives from interfering with any aspect of an acquisition that is likely to yield personal benefit.

D. Measure Financial Performance as a Resulting Benefit of the Social Contribution

Similar to charitable contributions, if a company can demonstrate that its investment in a PBC increases shareholder value and social welfare, it can decrease its risk of potential lawsuits and shareholder abandonment.¹⁰⁴ To account for this, a parent company must establish performance measurement systems that evaluate progress towards specific economic and social goals.¹⁰⁵

Some of the benefits that might manifest themselves as a result of a social enterprise acquisition may be intangible and long-term in nature, so it is crucial for the company to devise a method that can properly assess returned value.¹⁰⁶ As Matteo Tonello notes in an article on Corporate

99. EGAN, *supra* note 81, at 11.

100. See DEL. CODE ANN. tit. 8, § 144 (2013).

101. See DEL. CODE ANN. tit. 8, § 144(a)(1); Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

102. EGAN, *supra* note 81, at 96.

103. See *id.*

104. See Tonello, *supra* note 95.

105. *Id.*

106. *Id.*

Philanthropy, “Measuring social performance is challenging, but significant progress has been made in developing tools that companies can use to estimate the societal impact of their . . . activities, [including] procedures for estimating an overall social return on investment”¹⁰⁷ Increased transparency and clear impact statements that demonstrate directors’ smart investing decisions and indicating a real return to stockholders are important to validate any social enterprise investment. As an ancillary benefit, “disclosure may strengthen the company’s reputation as a good citizen with its customers and with the communities in which it operates.”¹⁰⁸

E. Involve Institutional Investors

As the number of institutional investors continues to increase,¹⁰⁹ their large share ownership is also being used to wield influence over managerial decisionmaking processes. Research indicates that institutional investors already influence, and in some cases curtail, corporate philanthropic giving.¹¹⁰ Therefore, it would not be unprecedented to see institutional investors further impact the level and amount of social enterprise investing. For example, the influence of institutional investors could potentially lead to stricter monitoring of corporate activities as a whole, or perhaps indirectly influence how companies support or favor certain types of transactions involving social enterprises.¹¹¹ Either way, directors should be prepared to welcome institutional investor input and, in the worst-case scenario, prepare to answer any criticism.

107. Tonello, *supra* note 95 (citing STEVEN ROCHLIN, PLATON COUTSOUKIS & LESLIE CARBONE, MEASUREMENT DEMYSTIFIED: DETERMINING THE VALUE OF CORPORATE COMMUNITY INVOLVEMENT (2001); MELINDA TUAN, MEASURING AND/OR ESTIMATING SOCIAL VALUE CREATION: INSIGHTS INTO EIGHT INTEGRATED COST APPROACHES (2008); Alnoor Ebrahim & V. Kasturi Rangan, *The Limits of Nonprofit Impact: A Contingency Framework for Measuring Social Performance* (Harvard Bus. Sch., Working Paper No. 10-099, 2010)).

108. Tonello, *supra* note 95.

109. “In 2009, institutional investors owned in the aggregate 73% of the outstanding equity in the 1,000 largest U.S. corporations.” Luis A. Aguilar, Comm’r, U.S. Sec. & Exch. Comm’n, Institutional Investors: Power and Responsibility, Remarks at J. Mack Robinson College of Business, Center for the Economic Analysis of Risk (CEAR)—Department of Finance, CEAR Workshop—Institutional Investors: Control, Liquidity, and Systemic Risks (Apr. 19, 2013), *available at* http://www.sec.gov/News/Speech/Detail/Speech/1365171515808#P21_2801.

110. Barbara Bartkus, Sara Morris & Bruce Seifert, *Governance and Corporate Philanthropy: Restraining Robin Hood*, 41 BUS. & SOC’Y 319, 319–44 (2002).

111. See Tonello, *supra* note 95.

VI. CONCLUSION

The new direction and addition of the PBC statute to Delaware's corporate code provides a measure of stability and predictability for socially motivated businesses. It is the type of forward-thinking, dynamic, and responsive law that businesses have come to expect from Delaware's state legislature. Yet at the same time, it creates an untested and unpredictable form, and as with any new law, there exists some level of unpredictability with regard to its application. Uncertainty about what constitutes the traditional corporate purpose following the *eBay* decision is further complicated when attempting to predict investor responses to a traditional corporation acquiring a PBC as a wholly owned subsidiary. Directors of public companies face a growing number of challenges¹¹² in carrying out their duties and managing new risks. But if the Campbell–Plum Organics illustration has revealed anything, it is that certain paramount steps¹¹³ can be implemented by directors of both the parent company and the target PBC subsidiary, which are within the business judgment of each board, that ensure shareholder trust remains intact and that both levels of businesses continue to thrive without issue.

112. *The Spotlight on Boards*, WACHTELL, LIPTON, ROSEN & KATZ (Sept. 2, 2014), <http://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.23521.14.pdf>.

113. See *supra* Part IV.